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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 272

GEORGE W. LEWIS,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

		Page
I.	Opinion below	2
II.	Jurisdictional statement	2
III.	Questions presented	2
IV.	Statutes and rules involved	3
V.	Statement of facts	3
VI.	Argument	8
	1. The decision of the Court of Appeals is in conflict with this court's recent pronouncements as to the duty of trial and appellate courts in net worth prosecutions	8
	2. The Court of Appeals erred in sustaining a conviction without proof of a likely source of income	12
	3. The requirement that a net worth starting point be fixed was ignored	15
	4. The Court of Appeals announced the extraordinary doctrine of requiring the defendant to prove his guilt in previous non indictment years	16
Conclusion		17

Table of Authorities Cited

Cases	Pages
Friedburg v. United States, 348 U.S. 142	11, 12
Holland v. United States, 348 U.S. 121, 75 S.Ct. 127	8, 11, 14, 15
United States v. Calderon, 348 U.S. 147, 75 S.Ct. 194	12, 15

Codes

18 United States Code, Section 3231	2
28 United States Code, Section 1254	2

Rules

Federal Rules of Criminal Procedure, Rule 18	2

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioner George W. Lewis, by his counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 30, 1955, affirming the judgment of the United States District Court for the Northern District of California, Southern Division.

I. OPINION BELOW.

The opinion of the Court of Appeals, filed on June 30, 1955, is appended to this petition as Appendix A (*infra,* pp. i-vii).

II. JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was entered on June 30, 1955 (Appendix B, *infra,* p. viii). An order staying mandate pending disposition of this Petition for Certiorari was entered on July 12, 1955 (Appendix C, *infra,* p. ix). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 18 U.S.C., Section 3231, and Rule 18, Federal Rules of Criminal Procedure.

III. QUESTIONS PRESENTED.

1. Where a taxpayer, prior to indictment, furnishes a lead to a government agent investigating his tax liability, may a subsequent conviction for tax evasion based solely on the "net worth theory" be sustained where the uncontradicted evidence is that the lead was furnished but never explored, though readily ascertainable?

2. Does the government sustain its burden of proof in a "net worth" case where it fails to show a likely source of income during the years covered by the indictment?

3. Is the government required to fix with reasonable certainty a "net worth" starting point at the beginning of the indictment period?

4. Is the defendant required to prove his own income tax evasion in prior non-indictment years in order to destroy the government's case based only on expenditures in excess of reported income during the indictment years?

IV. STATUTES AND RULES INVOLVED.

The statutes and rules involved are set out in Appendix D (*infra,* pp. x-xi).

V. STATEMENT OF FACTS.

Petitioner was convicted in the United States District Court for the Northern District of California, Southern Division, on May 13, 1954, of three counts of tax evasion. The first two counts concerned the separate returns of petitioner and his wife for the year 1947 and the third count concerned the joint return of himself and his wife for the year 1948.

The first count alleged an understatement of income in the amount of $187,817.22, and that he paid a tax of only $2,018.10 when the amount due was $145,761.90. Substantially the same figures were alleged in count two concerning the return filed for his wife for the same year 1947. The third count alleged that the joint

return for the year 1948 set forth an income of $115,153.06 and a tax due of $53,113.62 and that the correct income was $308,099.51 and that the tax thereon was $199,834.82. (TR 3-6.)

A jury returned a verdict of guilty on all counts after motions for judgment of acquittal were made at the conclusion of the government's case and at the close of the entire case. The defendant testified in his own behalf.

The government based its case on what it termed an "outgrowth of the net worth method called the source and application of funds method." (TR 464-465.) In short, the prosecution's case consisted of showing that money was spent in excess of reported income over a seven year period from 1942 to 1948, amounting to $832,993.06. It did not attempt to fix the net worth of the defendant at the beginning of either of the two years on which the prosecution was based.

The defendant contended that all of his income and that of his wife for the two years in question was properly reported and that expenditures in excess of reported income came from accumulations in prior tax years. The evidence disclosed that starting with the year 1904 the defendant began an association with horse racing that continued in various capacities until the year 1948. (TR 613-651.) For many of his adult years he engaged in the business of "bookmaking" at various race tracks throughout the United States and in Canada and Mexico. For the two years mentioned in the indictment and for some years prior thereto he

had been an official of the Detroit Racing Association acting in various capacities and for the year 1948 was general manager and president.

The prosecution established that in 1941 the defendant compromised a 1933 transferee tax liability and in so doing submitted a statement that his net worth was $10,000.00. (TR 72, Ex. 14F.) There was no evidence of any illicit or any illegal enterprises engaged in by the defendant during the years 1947 and 1948. There was no evidence that the excess of expenditures during those years by the defendant came from the same disclosed sources shown on his income tax returns.

Only two witnesses testified as to a possible source of income to the defendant other than that reported. Earl Beasley, a government witness, testified that in the year 1947 or 1948, he was not sure which, the defendant had told him that he the defendant had lost $125,000.00 betting on a horse owned by the witness. (TR 370.) It might not be inappropriate to point out that the government stipulated during the course of the trial that during 1947 and 1948 the defendant had loaned this witness $104,000.00. (TR 383, Ex. 57, Appendix Ex. 62.) The defendant sued to recover the loan in the United States District Court in Nebraska. (TR 384.) The deposition of this witness was taken prior to that trial and he stated that he had not gone to any safe deposit box with the defendant nor did he make mention of a $125,000.00 bet. After the appellant herein had testified at that trial the witness for the first time related the bet of $125,000.00. (TR 402-408.)

The other witness from whom the government sought to obtain testimony concerning a possible source of income was William C. Gaskill. He testified that in 1947 or 1948, he couldn't remember which (TR 358), he heard the defendant request another party present to make a bet on a horse in the amount of $15,000.00; that he did not know if the bet was made; that he did not see the defendant give any money to the other party (TR 359); but that two or three hours later he saw the defendant give such party a paper bag. (TR 360.)

The defendant took the stand on his own behalf. He testified as to his various activities in the racing world covering almost 50 years. He testified that as a result of bookmaking activities throughout the United States he had acquired $1,000,000.00 in currency by the year 1930 (TR 631), and that this money was kept in several different suitcases. Several witnesses corroborated the defendant's testimony in this respect. Each of them testified to his having large sums of currency prior to 1941, the so-called starting point of the government's net worth calculations.

The first was the government's witness John T. Laird. He had been examined extensively by the government with relation to numerous financial transactions he had with the defendant commencing with the year 1942 through 1948. (TR 408-425.) Upon cross-examination it was sought to elicit information concerning a financial transaction in 1941. (TR 427-428.) The government's objection on the ground that such questions were beyond the scope of the direct exami-

nation was sustained. (TR 428.) The Court required the defendant to make the witness a defense witness after an offer of proof. (TR 430-432.)

The witness testified that in the year 1940 or 1941 the appellant offered him $100,000.00 in currency to negotiate the purchase of the San Diego baseball club. (TR 435.) The defendant's wife testified that in the year 1928 the defendant was possessed of currency which he kept in a suitcase. (TR 563.)

Likewise the witness Normile testified to the defendant's possession of large amounts of currency in the years 1927-1928-1929 and to his earnings as a bookmaker. (TR 581-605.) Also a deposition of a witness John Geddert was read (TR 580) concerning currency in the possession of the defendant at times prior to 1941.

In the early 1940's the defendant was interviewed by agents of the Internal Revenue Bureau who were investigating his financial condition. He told the agent,

> "Well, if you want to find out how much I got there's the suitcase under the table—go in and count it." (TR 723.)

The defendant stated that at that time he had $1,000,000.00 in currency in the suitcase. The agent was not called as a rebuttal witness by the government and this evidence was uncontradicted.

VI. ARGUMENT.

1. THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THIS COURT'S RECENT PRONOUNCEMENTS AS TO THE DUTY OF TRIAL AND APPELLATE COURTS IN NET WORTH PROSECUTIONS.

In the recent case of *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, this Court pointed out the difficulties involved in using the net worth method and stated:

> "While we cannot say that these pitfalls inherent in the net worth method foreclose its use, they do require the exercise of great care and restraint. * * * Trial Courts should approach these cases in the full realization that the taxpayer may be ensnared in a system which, though difficult for the prosecution to utilize, is equally hard for the defendant to refute. * * * Appellate Courts should review the cases bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

In the instant case the record is devoid of any proof of a disclosed or undisclosed source of income sufficient to account for the expenditures made by the defendant. Their only origin was the cash accumulated in prior non-indictment years. That this was the only origin is manifest from the record in this case. That the accumulation of cash was in existence long prior to the indictment years was made known to the government by the defendant. (R. 721-724.) Thus under the pronouncement of the Supreme Court in the *Holland* case (supra) the failure of the government to

examine this lead should have been ruled as a fatal flaw of this prosecution.

Outlining the pitfalls encountered by the innocent who are prosecuted by the use of the net worth theory the Court had this to say:

> "While sound administration of the criminal law requires that the net worth approach—a powerful method of proving otherwise undetectable offenses —should not be denied the Government, its failure to investigate leads furnished by the taxpayer might result in serious injustice. It is, of course, not for us to prescribe investigative procedures, but it is within the province of the courts to pass upon the sufficiency of the evidence to convict. When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a pro-

> cedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

The record here shows that in the early 1940's the defendant was interviewed by agents of the Internal Revenue Bureau who were investigating his financial condition. He told the agent:

> "Well, if you want to find out how much I've got, there's the suitcase under the table. Go in and count it." (R. 723.)

At the time the defendant stated he had a million dollars in currency in the suitcase. That this is a probable fact is gathered from a reading of all the record which reveals that from the year 1906 until the middle thirties the defendant was in the bookmaking business. His stock in trade or inventory was currency. It could be said of him that all of his money was tied up in cash.

The evidence as to his interview by agent O'Connell was uncontradicted. It is assumed that if such testimony was false the government could quite easily have produced its own agent, Mr. O'Connell, as a rebuttal witness, but this was not done. This constituted evidence of a lead which the taxpayer had furnished the government—a lead reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. It was the type of lead, which, if not checked and found untrue, must be taken as true —and the trial Court hold as a matter of law that the evidence, based solely on the approximations and cir-

cumstantial inferences of a new worth computation, is insufficient.

There was no evidence in this record that the defendant was ever in economic want or his financial position throughout the years precluded his amassing the fortune he claimed. The record supports such a claim. The deposition of John J. Geddert already referred to shows that he was lending large sums of money, currency, to the money room at the Detroit racing track in the middle thirties. The testimony of Gene Normile (R. 581-605) shows that the defendant in the late twenties was possessed of large amounts of cash and that he booked "come back" money at Tia Juana to the extent of $150,000.00 a day. (R. 585.)

Thus the record presented here is far different from the one in the *Holland* case or in *Friedberg v. United States,* 75 S.Ct. 138, where the claims to large amounts of cash were overcome by a history of privation and economic hardship suffered by the taxpayers during the time they claimed to have made the accumulation.

The government in its attempt to overcome the facts relied solely on the uncorroborated extrajudicial statements of the defendant as to his financial status in 1941. (Exs. 14F, 58.) The circumstances under which such statements were given were explained by the defendant; that he made them in order to settle tax claims he felt were unfair, unfounded and arbitrary. Justice Clark's words with regards to such statements in the case of *Holland v. United States,* 75 S.Ct. 127, are appropriate. There he stated:

"But when a Revenue Agent confronts the taxpayer with an apparent deficiency, the latter may be more concerned with a quick settlement than an honest search for the truth."

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2. THE COURT OF APPEALS ERRED IN SUSTAINING A CONVICTION WITHOUT PROOF OF A LIKELY SOURCE OF INCOME.

In the case of *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, and the three cases decided that same day: *Friedburg v. United States,* 348 U.S. 142; *United States v. Calderon,* 348 U.S. 147, 75 S.Ct. 194, and *Smith v. United States,* 348 U.S. 147, it is to be noted that the alleged unreported income came from the same disclosed sources as produced the taxpayers' reported income and in an amount sufficient to account for the increase in net worth.

As indicated before only two witnesses testified with reference to a possible source of unreported income to the defendant. To so characterize the gist of their testimony is to view it in a light more favorable to the government than the testimony warrants. An examination of their testimony compels the conclusion that at most it permitted the jury to speculate and surmise that there might be a possible source of funds. This a jury is not permitted to do.

The government offered no direct testimony of unreported income items or of any undisclosed source of income. Faced with this lack of proof of an essential ingredient to a charge of willful evasion they produced two debtors of the defendant. The first was Earl

Beasley. The government at the outset of the trial stipulated that he was indebted to the defendant in the sum of $104,000.00. (Stipulation 57.) On cross-examination he repudiated this stipulation and denied the debt. (TR 391.)

This witness on direct examination related a conversation with the defendant wherein he claimed that the defendant had informed him that he had lost $125,000.00 betting on a horse owned by the witness. (TR 369-371.) He could not recall whether the conversation occurred in 1947 or 1948. He could not recall where or when the race was run. It was established without contradiction that the only time this particular horse raced with the particular jockey was on December 3, 1948. (Defs. Ex. L, TR 703.)

The second such witness was William Gaskill. He testified that he was present in the defendant's home and heard a conversation with reference to a $15,000.00 wager. (TR 358-359.) He could not remember whether it was 1947 or 1948. He did not see any money change hands, nor did he know if the bet was made.

Even giving full credibility to this testimony it does not establish a source of unreported income nor does it tend to prove with any reasonable certainty the year in which the occurrence took place.

There was no proof direct or circumstantial that the defendant was engaged in any business, during the indictment years, legal or illegal, other than those disclosed on his income tax returns. There was no proof of concealment or destruction of records. There

was no evidence, and there could be none of illicit or unlawful activities or a background thereof.

The Court of Appeals speaks of the defendant's "considerable involvement in gambling" and that his gambling activities "point plainly to a source of inordinate income." These statements are not supported by the record. There is no testimony or evidence that during the years 1947 and 1948 the defendant had a source of income from gambling.

In the *Holland* case this Court stated:

> "Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income. Increases in net worth standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient."

It is submitted that this record is devoid of any proof of a likely source during 1947 or 1948 that would account for the expenditures made by the defendant during those two years.

By way of illustration it might be pointed out that the government's calculations (Exs. 62-63, TR 467-494) showed that the defendant's expenditures in 1946, the year immediately preceding the indictment year, exceeded his funds available by $159,633.93. It would thus be concluded that at the start of the indictment period the defendant would be broke. Yet the prosecution stipulated that during the first 16 days

of January, 1947, the defendant loaned out $115,000 in cash. (TR 876-877.) The government offered no evidence as to its source so as to attribute it to currently taxable income during those sixteen days. Neither did it attempt by competent proof to exclude the hypothesis that such funds were available from accumulations in previous non-indictment years.

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3. THE REQUIREMENT THAT A NET WORTH STARTING POINT BE FIXED WAS IGNORED.

At no point did the prosecution attempt to fix the defendant's net worth at the beginning of the indictment period. They started with an extra judicial statement of the defendant made in an effort to settle a disputed tax liability and they lumped together receipts and expenditures over a seven-year period. The excess of expenditures over receipts in the last two years was then classified as taxable income for those two years.

This is contrary to the basic proposition laid down in *Holland v. United States,* 348 U.S. 121, 75 S.Ct. 127, that the government has the burden of establishing the opening net worth with reasonable certainty. There is no evidence here of a previously impoverished financial history to support an inference that there was no cash. There is not as much financial background as was held insufficient by this Court in *United States v. Calderon,* 348 U.S. 147, 75 S.Ct. 186.

The government was permitted to prevail in a criminal prosecution not by introducing proof beyond a

reasonable doubt but by setting forth approximations and then requiring the defendant to explain and refute them.

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4. THE COURT OF APPEALS ANNOUNCED THE EXTRAORDINARY DOCTRINE OF REQUIRING THE DEFENDANT TO PROVE HIS GUILT IN PREVIOUS NON INDICTMENT YEARS.

Not one of the principles which this Court has stated is requisite to a net worth prosecution was established in this case. No net worth at the beginning of the indictment period was established. No source of unreported income was proved.

Starting with a financial statement made seven years prior to the indictment period, admittedly untrue and given on advice of counsel to settle a disputed tax liability originally not his own, the government lumped together expenditures over a seven-year period and because they exceeded reported income obtained his conviction for the last two years.

No allocation between years was attempted. The defendant was indicted for tax evasion in 1947 and 1948. The government by its method of proof put him on trial for income tax evasion for seven years.

This method receives the blessing and sanction of the Appellate Court when it states:

> "If defendant had had proof of sources in some year past which he did not report, he could have brought in the proof and thereby the case might have been destroyed. But he was either unwilling or unable to produce the proof." (TR 954-955.)

It has always been an elemental principle of criminal law that the defendant is not required to prove anything. A clearer case of shifting the burden of proof cannot be visualized.

CONCLUSION.

For the foregoing reasons the Court should issue a writ of certiorari so that the important question of what constitutes a lead furnished by the taxpayer may be determined; that the proper safeguards announced by this Court may be applied and that the requirement that a defendant prove his innocence not be allowed to remain the law in this Circuit.

Dated, San Francisco, California,
July 25, 1955.

Respectfully submitted,
WAYNE L. PRIM,
Attorney for Petitioner.

JAMES E. BURNS,
HENRY W. HOWARD,
Of Counsel.

(Appendices A, B, C and D Follow.)

Appendix A

United States Court of Appeals
for the Ninth Circuit

GEORGE W. LEWIS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14,450 Jun. 30, 1955

Upon Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: Orr and Fee, Circuit Judges, and James M. Carter, District Judge.

James Alger Fee, Circuit Judge:

Lewis was indicted in three counts for attempting willfully and knowingly to defeat and evade income taxes by filing in each instance a false and fraudulent return: (1) understating his income in the amount of $187,817.22 for the year 1947, the return showing a tax due of $2,018.10 when actually $145,761.90 was due, (2) understating the income of his wife for the same year by $185,757.38, the return showing $2,884.55 due, whereas $146,189.40 was actually due, and (3) understating income and taxes of husband and wife

for the year 1948, the return setting forth an income of $115,153.66 and a tax due of $53,113.62, while the true income was $308,099.51 and the tax due thereon $199,834.82.

The trial was before a jury. Defendant made various motions, the gist of all of which is that the government had not proved its case by evidence relevant to net worth and expenditures. The government introduced evidence tending to prove income by showing that defendant had spent, invested or loaned $1,604,608.71 from 1942 to 1948, and that he had available from earnings, gifts, repayment of loans and all other disclosed sources a total of $771,615.65 during these same years. There was also evidence which tended to show that, allowing all adjustments for capital gains and other increases, defendant had net taxable income greatly in excess of the amount disclosed on his tax returns and those of his wife for each year from 1942 to 1948, both inclusive. The sources of income were probed, namely: defendant's many legitimate businesses and also his considerable involvement in gambling. It was also shown that defendant kept no records of his gambling operations, loans, investments or sources of income. Records of such transactions kept by other persons for their own purposes tended to establish the accuracy of the contentions of the government. The inference that the expenditures were of money from unreported taxable income was one which a reasonable person could draw from this evidence. The jury obviously did draw this inference and convicted defendant. Their deliberations

were probably assisted by defendant's explanation of the discrepancy between unreported income and established outgo. Defendant testified he had a million in currency acquired prior to the years in question. He explained he kept this hoard in suitcases.

The criticism of the defendant is that the government did not attempt to show either for the year 1947 or the year 1948, the two years in which the defendant was charged with evasion, (1) that the records from which his tax returns were prepared were inadequate for that purpose, (2) what the net worth of defendant was at the beginning of both of those years, or (3) that defendant had a source of income for those years other than that reported.

The appeal seems to have been prosecuted in order to take advantage of any change in the attitude of the Supreme Court upon the net worth and expenditure approach in such cases. This matter has now been laid at rest by the recent opinions announced by that court.

The claim is made that the case at bar is to be distinguished from such cases on the ground that the unreported income here does not come from the "same disclosed sources as produced the taxpayer's reported income". Holland v. United States, 348 U.S. 121, 126. As we have been admonished, this case is reviewed bearing constantly in mind the difficulties that arise when circumstantial evidence is the chief weapon of a method which is in itself only an approximation. In the past, such has been the policy of this Court in relation to these cases.

In this case at the outset, the absence of personal records is a circumstance of considerable weight. Men who have large financial interests do not normally in this day and age fail to have records. This is one of the stock criteria which a jury may take into consideration when determining whether the intent is fraudulent or no. The records here were not appropriate to the business in which he was engaged. It was not a case of inadequacy for defendant either kept no books at all or destroyed or concealed those which he had kept. The "net worth" method of approach was developed to meet just such a situation, in order that skillful concealment should not present a barrier to a different form of proof.

Defendant makes a point about his cooperation with the investigative officers in furnishing documents and records, including checks, and complains that the record does not show intent or willfulness by the admitted omission of certain items of income. The intent of defendant was in issue, and the fact of specific fraudulent intent was found by the jury under appropriate instructions which are not challenged. There was evidence to support the finding.

The difficulty of convincing a jury of the existence of substantial amounts of cash not considered in the net worth computation is mentioned. But here the explanation of defendant that for several years he kept a million in currency in suitcases throws considerable doubt either on his veracity or upon his common sense. Of course, the lack of records is of great importance here. There were no documents to indicate that

defendant had acquired such a sum of money in years prior to his income statements introduced in evidence, or even to show these returns were false for years as to which the statute of limitations had passed. The gambling activities of defendant point plainly to a source of inordinate income. If there were not a complete absence of records, some evidence might have been obtained showing these profits were obtained in some other year. A phenomenon closely allied to this discussion is the failure of defendant to prove the time and methods of acquisition of his suitcase hoard.

There is objection because the government did not establish a definitive starting point. But there is no doubt a point was chosen and, if accepted by the jury, was sufficient. The weight of the objection was that it was established only by admission of defendant in an attempt to get the agents to make a compromise of a previous deficiency in tax. However, this admission was corroborated by the circumstances under which it was made. Defendant offered to settle a liability of approximately $4,000.00 by payment of $1,500.00 in installments. He accompanied this with an affidavit that his total assets amounted to about $10,000.00. It seems this particular admission cannot be reconciled with concern for quick settlement rather than an honest search for truth. If he lied to avoid tax then with $1,000,000.00 in his possession and now admits it, the jury could appraise his present testimony accordingly. But it is said that about the same time he gave the government agents a lead. While an investigation was being conducted, which resulted from the receipt of

a crank letter by the Bureau of Internal Revenue, defendant stated he had a million in cash in a suitcase in the room at the time. Even on the cold record, this sounds fanciful. Its weight depends on the credibility of defendant, as it was not otherwise corroborated.

Another danger which has been suggested is that there may be confusion resulting in conviction based upon bare figures alone computed by the government. But in this case the minor amounts reported in prior years, while not to be taken into consideration to find guilt in years other than those charged in the indictment, had probative value when the tremendous expenditures in the years for which he was indicted are considered. There is difficulty in all such cases in allocating to the respective indictment years the deficiency. But here the accounting of the government showed the expenditures, and the tracing went back for several years to show that there were no possible sources of the money so spent. To the ordinary mind, this, coupled with the showing of lack of sources, would indicate that the money was made within the year. In fact, the circumstances of this case seem to point irrefutably to the conclusion beyond a reasonable doubt. There was no shifting of the burden. If defendant had had proof of sources in some year past which he did not report, he could have brought in the proof and thereby the case might have been destroyed. But he was either unwilling or unable to produce the proof. The mere possibility that the figures of the government might have been explained by sources of income proven in prior years does not show that the

burden of proof was shifted. The same situation may develop in any criminal case. In this case, upon the record it is plain there was proof beyond a reasonable doubt and the question was whether the jury were to be convinced thereby. Of course, there is always a possibility in a criminal case that a defendant may be convicted upon counts of which he is innocent, but on this record the Court can say with some assurance that it did not happen here. The statements and attitude of defendant during the course of the investigation may have been prompted by the hope that he would not be prosecuted, but that is hardly a ground for acquittal.

In any event, the trial court carefully instructed the jury in this case. The jury found the defendant guilty on the facts shown by the evidence. There was substantial evidence to support each essential element of the finding.

The judgment of conviction is affirmed.

(Endorsed:) Opinion. Filed Jun. 30, 1955.
Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals for the Ninth Circuit

GEORGE W. LEWIS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14,450

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and Entered: June 30, 1955.

Paul P. O'Brien, Clerk.

Appendix C

United States Court of Appeals
for the Ninth Circuit

GEORGE W. LEWIS, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 14,450

ORDER STAYING ISSUANCE OF MANDATE

Upon application of James E. Burns, counsel for the appellant, and good cause therefor appearing, It Is Ordered that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of *certiorari* to be made by the appellant herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before July 29, 1955. In the event the petition for writ of *certiorari* is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

James Alger Fee,
United States Circuit Judge.

Dated, San Francisco, California,
July 12, 1955.

Appendix D

Statutes and Rules Involved

Internal Revenue Code of 1939:

Section 41. General Rules.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1946 ed., Sec. 41.)

Section 145. Penalties.

* * * * * * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this

chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(26 U.S.C. 1946 ed., Sec. 145(b).)

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	2
Argument	7
Conclusion	10

CITATION

Cases:

Holland v. *United States*, 348 U. S. 121 ..... 7, 8, 9, 10
Smith v. *United States*, 348 U. S. 147 9
United States v. *Calderon*, 348 U. S. 160 9
United States v. *Johnson*, 319 U. S. 503 ..... 7, 9

Statute:

Internal Revenue Code of 1939, Sec. 145 (26 U. S. C. 1952 ed., Sec. 145) 2

356502—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 272

GEORGE W. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. i–vii) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1955 (Pet. App. vii). The petition for a writ of certiorari was filed on July 28, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for wilful attempted income tax evasion, the evidence was

sufficient to establish the starting point for the Government's expenditures computation of petitioner's unreported taxable income.

2. Whether the evidence was sufficient to establish a possible current taxable source for petitioner's expenditures in excess of reported taxable income.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 145. PENALTIES.
>
> * * * * *
>
> (b) *Failure To Collect and Pay Over Tax, or Attempt To Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.
>
> * * * * *
>
> (26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On January 13, 1954, a three-count indictment was returned against petitioner in the United

States District Court for the Northern District of California, Southern Division, charging him with having willfully attempted to evade and defeat his and his wife's income taxes for 1947 and 1948 [1] (R. 3–6). The indictment alleged the following deficiencies:

Year	Reported		Corrected	
	Income	Tax	Income	Tax
1947 (Husband)	$9,483.25	$2,018.10	$197,300.47	$143,761.90
1947 (Wife)	11,543.09	2,884.55	197,300.47	146,189.40
1948 (Joint)	115,153.06	53,113.62	308,099.51	199,834.82

After a jury trial lasting approximately nine days, petitioner was found guilty as charged (R. 16). On June 8, 1954, he was sentenced to one year in prison plus a fine of $24,000 (R. 18–19). The Court of Appeals affirmed the conviction (Pet. App. i–vii).

The evidence to support the verdict may be summarized as follows:

In 1904, at the age of fourteen, petitioner began an association with organized horse racing that was to continue, in various capacities, throughout his adult life (R. 612–613). Although his formal education extended only through the eighth grade, his adeptness at mathematics led him to become not only a bookmaker but an official odds-maker at several race tracks (R. 612–614, 623, 637–638). He

[1] For 1947 petitioner and his wife filed separate returns with reported income computed on a community property basis. For 1948 they filed a joint return.

testified that in 1932 he ceased functioning as a professional bookmaker but admitted that he thereafter continued personal wagering on horse races, both at and away from the race tracks (R. 756, 799–800).

From 1924 through 1948 he used a combination cigar store-social club as his office and mailing address (R. 76, 266–267, 372–373, 454–455, 711, 753, 803, 896). The Government introduced evidence that there were horse bets made on these premises and that the premises were owned by petitioner in 1947 (R. 361, 374–375). Admittedly he had access to the safe located there (R. 709, 804). One Government witness testified to having observed petitioner instruct a third party to place a $15,000 horse bet for him in late 1947 or early 1948 and another testified to a conversation with petitioner during 1947 or 1948, wherein the latter remarked that he had lost $125,000 betting on a particular horse running at Tanforan (R. 358–360, 370–371). Petitioner denied the magnitude of this wager, stating that he had only made a "small bet" of $1,000 on the race (R. 703–704). He reported no gambling income on his returns for 1947 and 1948 (R. 227–233).

In 1947 and 1948 petitioner was employed by the Detroit Racing Association. In 1947 he acted as the track's paid "advisor" and in 1948 was its president and general manager (R. 651, 688). According to a deposition by the secretary of the association petitioner received a $100,000 salary

plus a bonus of about $100,000 during 1948 (R. 640, 652, 893). In contrast petitioner reported only $100,676.40 salary on his 1948 return as income from that source (R. 229–230). Petitioner's 1948 return also failed to reflect $43,198.44, his pro rata share of partnership income for that year from the Laurel Pottery Manufacturing Company (R. 238–239).

Petitioner kept no adequate records of his income (R. 460–462, 748). The Government, therefore, computed his taxable income for the years from 1942 to 1948, inclusive, by showing his expenditures during each of those years, the funds available from his declared resources for the making of such expenditures, and the annual excess of expenditures over available resources (R. 464–465). This computation established the following amounts of unreported income (R. 467-500; Exs. 61, 62, 63):

1942	$9,411.94
1943	1,668.59
1944	21,632.69
1945	39,973.52
1946	158,582.54
1947	469,779.35
1948	193,063.69

Petitioner conceded the accuracy of the Government's figures as to his expenditures (R. 859–861), but he claimed that he had more funds available than the Government had allowed. His explanation was that he had accumulated $1,000,000 in currency by 1930 which he thereafter carried with him in suitcases (R. 631, 654, 861)—

an explanation which was rendered highly implausible by his admission at the trial that he still retained the largest part of this currency at the end of 1947 (R. 771–774). Furthermore, although petitioner insisted that he had reported large amounts of income between 1920 and 1928 (R. 733–750), he had no records of these returns (R. 620–630, 731–754) and the Government's records revealed no George W. Lewis who had paid more than nominal amounts from 1920 through 1935 (R. 918–926).

There was cogent evidence to support the Government's contention that petitioner had only about $10,000 available at the end of December 1941, the starting point of the Government's expenditures computation (R. 469–470). During 1940 and 1941 petitioner submitted several offers in compromise of approximately $4,400 taxes owed by a corporation whose assets had been transferred to him. On March 25, 1940, he offered $500 and stated that his own net worth was "nil." On January 15, 1941, he offered $1,000, and on April 15, 1941, he again raised the offer to $1,500, to be paid in installments, and explained that he was unable to pay more. A final offer of $1,500, with more prompt terms of payment, was made in the following October and ultimately accepted by the Government in December. (R. 58–77.) In November petitioner filed a sworn statement of his financial condition with a Collector

of Internal Revenue in which he listed his only assets as $5,100 in cash and an automobile worth $1,300. He stated that his gross income for the last three calendar years had been $4,600, $5,100 and $9,700 respectively (R. 342–349, 820–829).

ARGUMENT

1. In view of the evidence set forth above there is clearly no merit to petitioner's contention (Pet. 15–16) that the Government failed to establish an adequate starting point for its computation of his resources at the beginning of the indictment years. In this case the Government used a variation of the net worth method in which attention is directed to the excess of the taxpayer's expenditures over his available declared assets during any given year, rather than to increases in annual net worth in excess of reported taxable income.[2] It was shown, by petitioner's own sworn statement of November 1941 and by the several offers in compromise of the corporation's tax liability, that he could not have had assets significantly in excess of $10,000 at the beginning of 1942. The Government then showed his expenditures and his traceable receipts in each of the years from 1942 to 1946, inclusive (R. 468–480). In most of these years expenditures far exceeded receipts, and

[2] This type of computation of unreported income was used in *United States* v. *Johnson*, 319 U. S. 503, 517, and this Court has noted the fact that it is simply a variation of the net worth method. *Holland* v. *United States*, 348 U. S. 121, 124.

CONCLUSION

The judgment of the court below is correct and presents no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Ernst